

KAREN R. TONY ET AL.

IBLA 82-29

Decided November 24, 1981

Appeal from decision of Alaska State Office, Bureau of Land Management, deeming unpatented mining claim abandoned and declaring the mining claim recordation void. AA 31231.

Reversed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), in the proper Bureau of Land Management Office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Abandonment

Where, on or before Oct. 22, 1979, a mining claimant files proof of assessment work for a claim located prior to Oct. 21, 1976, which proof had been duly filed in the local offices of the state wherein the notice of location was filed, but such assessment work was not performed in the assessment year preceding the filing, the

claimant has complied with the statutory requirements and should be afforded an additional opportunity to comply with the regulatory requirements prior to a finding of abandonment.

APPEARANCES: Karen R. Tony, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Karen R. Tony, on her own behalf and for the co-owners of the Irish #1 lode mining claim, 1/ appeals the Alaska State Office, Bureau of Land Management (BLM), decision dated July 15, 1981, which deemed the Irish #1 lode mining claim, AA 31231, abandoned because the affidavit of assessment work for 1979 was not received by BLM prior to October 22, 1979, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and voided the recordation of the mining claim with BLM.

Appellant alleges she mailed the affidavit of assessment work for 1979 upon receipt of the copy from the recorder's office for the Chitina Recording District, and avers the mailing to BLM was before December 30, 1979. She also asserts that she had sent a notice of intention to hold the claim earlier in 1979, so that one way or another, she felt that she had complied with the requirements of FLPMA.

Contrary to the averment of appellant, the envelope in which the affidavit of assessment work for 1979 was mailed bears a postmark of January 8, 1980, from Fairbanks, Alaska, and was received by BLM on January 11, 1980. The affidavit of labor is stamped as having been recorded in Chitina Recording District September 25, 1979.

The record shows that Irish #1 lode mining claim was located July 13, 1971. On October 5, 1979, a copy of the recorded notice of location and a proof of labor for the 1978 assessment work year were filed with BLM, together with advice that the proof of labor for the current year would be submitted upon receipt from the recorder. There is no document in the case file which can be construed as a notice of intention to hold the mining claim for 1979 in accordance with 43 CFR 3833.2-3(a)(1). The proof of labor for the 1980 assessment work year was filed with BLM October 23, 1980.

[1] As we noted in our recent decision in Harry J. Pike, 57 IBLA 15 (1981), the statute, 43 U.S.C. § 1744(a) (1976), provides:

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976, and prior to December 31 of each year thereafter * * * [f]ile for record

1/ The owners of the Irish #1 lode mining claim are Karen R. Tony, Polly Tony, Peter Tony, Bennie Leonard, and George Cornelius.

in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim[.] * * * an affidavit of assessment work performed thereon, or a detailed report provided by section 28-1 of Title 30, relating thereto.

Appellants' submissions on October 5, 1979, did, indeed, meet the statutory dictates. The regulation, however, fleshes out this statutory requirement in more specific terms. Thus, 43 CFR 3833.2-1 provides:

The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim. [Emphasis added.]

The underlined portion of this regulation is not part of the statutory language. The statute only requires that a proof of assessment work be filed; it does not speak to which assessment year the proof must be for.

A comparison of the statutory and regulatory language reveals that 43 U.S.C. § 1744(a) merely requires the timely filing of an affidavit of assessment, while the Departmental regulation, 43 CFR 3833.2-1, specifically requires the timely filing of an affidavit of assessment for the preceding assessment year. Appellant timely filed the instrument required under the terms of the statute when he filed the 1978 affidavit of assessment, but BLM declared the claim void for failure to file the 1979 affidavit of assessment. In light of Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), we reverse.

In Topaz Beryllium Co., *supra*, the court of appeals considered the regulations in Subpart 3833 and recognized that certain parts, specifically, the filings related to notices of location, require more than does section 1744. With respect to these further filings, the court said:

We conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833 -- and not by the statute -- are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision." [Footnote omitted, emphasis in original.]

[2] We consider this holding by the court of appeals to encompass the situation before us. Thus, we hold that where a mining claimant files with BLM an affidavit of assessment work within the prescribed time period which is not the affidavit of assessment work for the preceding assessment year, BLM should notify the claimant of the deficiency and allow him an opportunity to submit the precise instrument required by the regulation. Failure to do so will result in the claim being declared abandoned and void. See Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981).

In this case, the owners of the Irish #1 lode mining claim have already submitted the evidence of assessment work for the 1979 assessment year. Accordingly, nothing further is required from them for 1979 to comply with our holding herein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

